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NEWPORT HARBORWALK PUBLIC ACCESS ISSUES

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Practically speaking, there are two legal devices available for maintaining and obtaining rights of access over private property that may be used in the context of the Newport Harborwalk: servitudes and the Public Trust Doctrine (PTD). While there are similar results that may be reached through the use of these devices, each is unique in its history and application, therefore each will be addressed in turn. There are several types of servitudes that will be described. However, realistically, few of these are actually applicable, so only the most relevant ones will be expanded upon to include their history in Rhode Island case law, and then these will be discussed for their possible use for the Newport Harborwalk. The PTD is a general rule that can be applied in many contexts, but has been used in other cities as a means of obtaining and maintaining harbor paths similar to the one in Newport. Therefore, the doctrine will be briefly described in general, followed by a description of how it has been adopted and interpreted in Rhode Island, and finally compared with how it has been used by other cities, mainly Boston, in the Harborwalk context.

I. Servitudes

Servitudes are rights associated with land ownership that arose through the common law, and are subject to the laws of each state individually, but have also been codified in nationally recognized legal authorities such as the American Law Institute's *Restatement (Third) of Property: Servitudes.*[1] A servitude is defined as "[a] charge or burden resting upon one estate for the benefit or advantage of another."[2] There are two main types addressed here: easements and deed restriction. There are also sub-categories for each of these types. There are three sub-categories that are likely the most applicable in

[1] A.L.I. (2011).
[2] *Black's Law Dictionary*, (Revised 4th ed. 1968).

the context of the Newport Harborwalk, namely express easements, conservation easements, and real covenants. These three sub-categories will be explored in more detail. They will then be discussed regarding their advantages and disadvantages for maintaining or obtaining rights of access for the Newport Harborwalk.

A. Types[3]

1. Easements

An easement is a legally recognized agreement giving a person or the public the right to use another's land for a specified purpose, or alternatively, an agreement restricting a landowner's use of their land. The former is an affirmative easement; the latter is a negative easement. It is important to note that one may use land for a specified purpose under a license. However, a license does not create an interest in the real estate, and whatever uses a license may grant, those uses are not permanent. For that reason, easements require more formalities in their creation than do licenses. Because easements create a permanent interest in the land, courts generally require a writing manifesting a clear intent to create an interest in the land.

Easements are divided into two types, based on where the benefit of the interest conferred lies. If the benefit of the interest lies with a parcel of land to the detriment of another parcel of land, it is known as an *easement appurtenant*. For instance, if the easement states that lot A has access to the main road via a driveway on lot B, regardless of the owners of lot A or B, then lot A has been granted an *easement appurtenant*. The second type of interest, and the one likely to be most pertinent to the Newport Harborwalk, is an

[3] Unless otherwise noted, descriptions of the legal devices in (A)1-3 are based on information in: John G. Cameron, Jr., *Easements and Other Servitudes*, ST005 ALI-ABA 815, A.L.I. (2011).

easement in gross. With an *easement in gross*, the benefit is conferred on a particular person, or organization. Often these easements may not be transferred, however some states, including Rhode Island, allow assignment of easements in gross.[4] An example of this type of easement would be an owner of lot A granting the CRC, and any of its assignees, the right to use a pier on lot A as part of a walking path for the Newport Harborwalk.

There are a number of ways to create an easement, however under the circumstances surrounding the Newport Harborwalk, the only relevant, desirable option is by an express grant or reservation. This must be done in a written instrument, which should be recorded. The written instrument may be anything from a deed, to a document of conveyance, to a mortgage, and it should set forth the intended purpose of the easement, i.e. "the right to be used as a public walkway." Courts generally favor the servient tenement, therefore the language of the grant is very important. For instance, if the language is unclear whether an easement is being granted, courts tend to favor granting of a license rather than an easement. Further, courts will not allow those who benefit from the easement to expand their usage beyond the grant. Therefore, if a grant was made for a walking path, a court may find that biking was not permitted because it was not specifically granted.

2. Conservation Easements

While essentially a negative easement in gross, a conservation easement is a unique and more specific servitude that was created by statute rather than common law. Each state can create its own version of conservation easement, but generally it is defined as

> [a] nonpossessory interest of a holder in real property imposing limitations or affirmative obligations [,] the purposes of which include retaining or

[4] *See Grady v. Narragansett Elec. Co.* 962 A.2d 34, 42 (R.I. 2009).

> protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological or cultural aspects of real property.[5]

Under a conservation easement, the owner retains ownership of the land but conveys certain specified rights to an organization for any of the previously listed purposes. In other words, it is private regulation, where the holder of the easement regulates the landowner's activities, and any subsequent landowners as well. Conservation easements are usually only granted to non-profit or government agencies. They also provide tax breaks for landowners who are subject to their limitations as incentive for private property owners to their land to be burdened. In Rhode Island, the state government takes a strong interest in enforcing the terms of an agreement that gives rise to a conservation easement.[6]

3. Deed Restrictions and Real Covenants

A deed restriction is a covenant or condition in a deed that restricts the free use and enjoyment of the property by the landowner. A covenant is an assurance that something will be done, while a condition dictates what legal effects certain events have on the parties bound by the restriction. More specifically, a real covenant is a promise regarding the land, which runs with the land, and is much like a contract. However, there are several requirements that must be met for a real covenant to bind future landowners to the promise. Traditionally, the burden and benefit of the covenant must "touch and concern" the land, the parties must intend the covenant "run with" the land, and their must be privity of estate between the party claiming the benefit and the party subject to the burden. That

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[5] Thomas Grier, *Conservation Easements: Michigan's Preservations Tool of the 1990s*, University of Detroit Law Review, Vol. 68, 194 (1991) (quoting Uniform Conservation Easement Act § 1(1), 12 U.L.A. 64 (Supp. 1989)).
[6] *See, e.g.,* R.I. Gen. Laws §§ 34-39-1 to-5 (1995 & Supp. 2010).

is, the benefit and burden must apply to the land, not people, and the original parties to the agreement must have expressly intended the covenant to bind subsequent landowners. Privity of estate merely requires that subsequent landowners subject to the burden in through privity between the former owner and the new one. However, the *Restatement of Property (Third)* has taken a relaxed stance on the need for the benefit and burden to touch and concern the land, suggesting that an individual or organization may be able to hold the benefit in perpetuity.[7] It is also important to note that courts, including courts in Rhode Island, favor the free use of land, such that all doubts will be resolved in favor of the free use of property.[8]

B. Possible Uses of Servitudes for Newport Harborwalk

Each of the aforementioned servitudes may provide an avenue for obtaining and preserving the Newport Harborwalk in perpetuity. However, each has its disadvantages, and in the end, a conservation easement is likely the best option, and that still may not be available under the circumstances. This section will address the possible servitudes from least preferable to most. All of them suffer from the same problem, namely, that they require the consent and cooperation of the current landowners. There are ways to obtain servitudes without consent, but the requirements to do so are so practically unlikely as to not warrant consideration.

Real covenants, while offering a strong form of preservation for the intended uses of Newport Harborwalk over private property, are probably the weakest option. The numerous requirements to establish a real covenant provide a subsequent landowner dissatisfied with the encumbrance fertile areas for challenging the covenant's validity.

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[7] *See, supra.,* note 1, § 3.2.
[8] *See, e.g., Ashley v. Kehew*, 992 A.2d 983, 989 (R.I. 2010).

Couple that with the fact that the law tends to favors free of use of land by its owner, and the attempt to bind private property owners through covenants could lead to legal challenges that quickly sap resources, and have a high risk of being unsuccessful.

Another problem with covenants is that in Rhode Island, while no court has expressly ruled that the covenant need not "touch and concern" land, the current rule recognizes covenants "running with the land."[9] Therefore, the only way for a covenant regarding the Newport Harborwalk to be enforceable, would be for the covenant to be made "running with" some land that shares the burden and benefit of the walkway with another piece of land, or, to grant the benefit of the walkway to the organization in charge of the walkway, and risk a judicial decision declining to recognize the existence of a covenant in that situation. The *Restatement (Third) of Property* would recognize the latter, but that is no guarantee the Rhode Island court system would do the same.

Easement in gross is probably the best option as far as easements are concerned. *Easement appurtenant*, similar to real covenants, requires that the benefit in the grant be conferred to a lot of land rather than a person or organization. Therefore, an *easement in gross* could provide the right of access to the organization as the benefit. The problem then becomes one of convincing property owners to essentially give up part of their use and enjoyment of their land to the general public. This would likely require some form of compensation, which given the amount of private property owners and desirability of maintaining property values in the area, could amount to a hefty sum of money.

Thus, the servitude that provides the best option is a conservation easement. It provides all the protections of an easement in gross, and the compensation could take the

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[9] *See, Ridgewood Homeowners Ass'n v. Mignacca*, 813 A.2d 965, 971 (R.I. 2003).

form of the tax breaks and incentives that the burdened property owners would have available. However, it is not as simple as just granting a conservation easement, as it must comply with Federal law in order for the tax breaks and incentives to apply, and the easement will only be enforced by the courts in an action where the state attorney general has been joined as a party.[10] Further, the valuation of the tax breaks has been the source of some controversy, which may make already reticent private property owners more reluctant to grant even a conservation easement.[11]

II. Public Trust Doctrine

The Public Trust Doctrine (PTD) holds a unique place in the legal world, as it is widely accepted as a valid legal doctrine, however it has no foundation in the U.S. Constitution. Rather, it has its basis in natural law and Roman codes, which stand for the principle that the air, running water, the sea and seashores are property owned in common by all.[12] The coastal states of the United States have all adopted and interpreted this principle in their own ways, but all recognize that it is an obligation on each state to regulate the seashore where the ocean meets the land. In fact, the U.S. Supreme Court has recognized that each state has the authority to define the scope of its own public trust, leaving to the states' sovereign control decisions regarding the use of shores by upland owners.[13] The Court has gone on to say that this obligation requires each state to maintain that sovereign control, because it could "no more abdicate its trust over property in which

[10] *See, supra.*, note 6.
[11] *See,* Jessica Owley, *Changing Property in a Changing World: A Call For The End of Perpetual Conservation Easements*, 30 Stan. Envtl. L.J. 121 (2011).
[12] Denise J. Dion Goodwin, *Massachusetts's Chapter 91: An Effective Model For State Stewardship Of Coastal Lands*, 5 Ocean & Coastal L.J. 45, 47 (2000).
[13] *See, Shively v. Bowlby*, 152 U.S. 1, 58 (1894).

the whole people are interested . . . than it can abdicate its police powers."[14] This section first describe aspects of Rhode Islands version of the PTD, then details how Massachusetts and the city of Boston have utilized Massachusetts' adoption of the PTD to establish a harborwalk in that city, and lastly, concludes by discussing how Boston's harborwalk may be used in the context of the Newport Harborwalk.

A. Rhode Island Public Trust Doctrine

The Rhode Island Constitution in Article I, Section 17 recognized the rights traditionally associated with the PTD, stating that the people of the state shall enjoy, among other things, the privileges of the shore including passage along the shore. The Rhode Island Supreme Court has stated that these rights are protected from the mean high water mark seaward.[15] The state of Rhode Island maintains title in those lands in fee simple, and has delegated regulation of trust duties to the Rhode Island Coastal Resources Management Council.[16] However, the Rhode Island Supreme Court, recognizing the importance of balancing private and public rights, has limited the PTD. In certain situations, shore-side private property owners who fill in along their shoreline may establish title to that land free and clear of the restrictions established by the PTD, and the legislature may by decree delegate control or regulation of property below the mean high water mark to cities or municipalities.[17] Because of this, the PTD may not be uniformly regulated or controlled consistently throughout the state at the administrative level.

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[14] *See, Illinois Central R.R. v. Illinois*, 146 U.S. 387, 452-53 (1892).
[15] *See, e.g., Town of Warren v. Thornton-Whitehouse*, 740 A.2d 1255, 1259 (R.I. 1999).
[16] *See,* R.I.G.L. §§ 46-23-6(2), 46-23-6(4), 46-5-1.2(a).
[17] *See, Town of Warren*, 740 A.2d at 1259-60; *and see, Greater Providence Chamber of Commerce v. Rhode Island*, 657 A.2d 1038, 1044 (R.I. 1995).

The purpose of the PTD, land held in trust for the public's use and enjoyment, has influenced and interacts with the Rhode Island Legislature's policies and regulations regarding the public's use of private land. One such important regulation is the Recreational Use Statute (RUS).[18] This statute was enacted to encourage private landowners to allow use of their land to the public to achieve more use of public space for recreational purposes.[19] In order to do this, the legislature has limited the private owners exposure to liability[20]. Courts interpreting the RUS have found that the limitation protecting private landowners may not apply to organizations or government entities that have exercised control and over the publically used land.[21] So while this statute incentivizes private owners to allow the public to use their land for recreational purposes by limiting their liability, the liability exposure arising from the public's use of that land may then fall on the organization or government entity controlling or maintaining the use of that land.

B. The Use of PTD for the Newport Cliff Walk

The City of Newport (City) has developed and maintained over the years a shore-side walkway called the Cliff Walk, which the Rhode Island Supreme Court classifies as "a public easement over private land."[22] The authority of the City to control the Cliff Walk, as well as all of its associated rights, duties and liabilities, combine aspects of the PTD, City Ordinances and Rhode Island property law, including the RUS. The history and circumstances of the Cliff Walk and the City's exercise of authority in maintaining it for

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[18] *See* R.I.G.L. § 32-6-1 et seq.
[19] *See id.* § 32-6-1.
[20] *See id.* § 32-6-3 to- 5.
[21] *See, e.g., Berman v. Sitrin*, 991 A.2d 1038, 1053 (2010) *contra. Cain v. Johnson*, 755 A.2d 156, 163-64 (2000) (Goldberg, J. dissenting).
[22] *See Berman* 991 A.2d at 1041; www.cliffwalk.com (last visited April 25, 2012).

public use are an example of how a city, the State of Rhode Island, and private owner's rights and liabilities interact when it comes to property rights regarding shore-side access. However, there are certain differences between the Cliff Walk and the Harborwalk which make the Cliff Walk distinguishable.

The Cliff Walk has a strong historical presence, which has helped the town of Newport make it the "brightest gem in its tourism crown."[23] It started as paths along private property in the late 18th early 19th century and developed into a coastal pathway traversing 3.5 miles of coastline open to the public.[24] Because the public has had access to these paths over a long period of time, the Rhode Island Supreme Court has found that it is a public easement.[25] The City, in order to exercise authority and control over the land, made ordinances to regulate its use by the public, as well as passed resolutions acknowledging that it is the responsibility of the City and the State to bear responsibility for maintaining and supervising the Cliff Walk.[26] This recognition by the courts, the City and the State government all incorporate aspects of PTD, property law in giving the primary authority to control an maintain the Cliff Walk, and the private land over which it traverses, to the Town of Newport.

This application and interpretation, both by the government entities and by the courts, has positive and negative implications for the Newport Harborwalk. The best thing to take from this is that with the Recreational Use Statute, private owners may be more willing to allow use of their properties because they will not be exposed to greater liability by doing so. Further, if the Cliff Walk is any indication, the organization in charge of any

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[23] *See Cain* 755 A.2d 156 at 170; www.cliffwalk.com.
[24] *See* www.cliffwalk.com.
[25] *See Berman* 991 A.2d at 1047.
[26] *See id.* at 1046; *see also* Council Resolution No. 12-70.

easement granted by a private property owner, be it a government organization or private entity, should have wide latitude to regulate and control that property. However, with this control also comes the potential for broader liabilities should something happen. This is the way the courts have moved, and thus the organization that is placed in charge of the Walk should be prepared for the exposure to damage awards for personal injuries.

Lastly, it should be pointed out that the Cliff Walk is unique in that it developed over a long period of time, had a strong historical basis on which the town could use to assert control, and as it was a strong tourism draw, the town had a strong interest in it. Without the historical basis or potential for increased tourism, any Harborwalk project may have difficulty in drawing the kind of support it needs in the local or state governments in order to get to the point where there is an organization with strong legal rights to assert control in any easements that are granted by the private property owners.

C. The Use of PTD and Zoning Plans in Developing Other Cities' Harborwalks

Boston, like Newport, has a crowded historical harbor area with a harborwalk created for the public's enjoyment of the shore. The harbor area in Boston, including its harborwalk, was developed largely in part to the regulations promulgated under Massachusetts PTD. This section will first briefly describe some aspects of the Massachusetts PTD, and how they were used to develop the Boston harbor area, specifically the harborwalk. It will then expand upon other cities use of zoning regulations and plans to create public access to waterfront areas.

Massachusetts has long recognized and taken seriously its responsibilities under the PTD and outlined by the U.S. Supreme Court in the *Shively* and *Illinois Railroad* cases.[27]

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[27] *See* Goodwin, supra., note 12 at 48-50.

From its first recognition of PTD in the Colonial Ordinances of 1641-1647, to its current codification of the PTD in Massachusetts General Law chapter 91 (Rule 91), that State has by and large been successful and effective for preserving the public's interest in the shoreline, as evidenced by its extensive waterfront development, and 40-plus mile long harborwalk.[28] While the rules and regulations promulgated under Rule 91 are not without criticism, the Massachusetts Supreme Judicial Court has largely upheld the protections promulgated to protect the public's interest in shoreline properties.[29]

Two key distinctions between Rhode Island's PTD and the Massachusetts version, are the fact that in Massachusetts, a private owner filling shoreline property can only be granted free and clear title to that land if there were certain express intentions made clear in the legislative action granting title, and importantly, there must be a valid public purpose behind the grant.[30] Also, while Massachusetts has delegated its duties to an administrative authority, municipalities zoning rules and regulations are still subject to the rules and regulations of Rule 91 (and often adopt them), creating a more uniform application of PTD throughout the state.[31] By protecting the public rights through this sort of regime, both the City of Boston and the State of Massachusetts have been able to regulate developments, requiring that any new developments include wide walkways that connect the harborwalk pathways near the shoreline.[32] It should be noted, however, that the Boston harborwalk is

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[28] *See id.* at 72-73; http://www.bostonharborwalk.com/about_harborwalk/ (last visited April 25, 2012).
[29] *See, e.g.,* Goodwin, *supra.*, note 12 at 50-57, 62-67.
[30] *See, Boston Waterfront Development Corp. v. Commonwealth*, 393 N.E.2d 356, 365-66, 369(Mass. 1979) (holding that even formerly submerged land that had been filled and built upon remained impressed with a public trust).
[31] *See,* Kristen Hoffman, *Waterfront Redevelopment as an Urban Revitalization Tool: Boston's Waterfront Redevelopment Plan*, Harv. Envtl. L. Rev. 471, 482-83 (1999).
[32] *See id.* at 497-99, 510.

not completed, and has developed not only through use of Rule 91 regulations, but also through connections and relations with private property owners not subject to Rule 91.[33]

Lastly, it is worth noting that other larger cities such as Baltimore, San Antonio, and New York City have used combinations of zoning regulations and private development plans to develop waterfront tourist attractions with public walkways similar to those in Boston.[34] While these cities did not rely on PTD the way that Boston did, the use of zoning regulations to ensure public access to shoreline areas serves the same purpose as the PTD, and ultimately can achieve similar results. However, given the fact that the properties at issue here have already been developed, this process of creating shoreline access may not be quite as applicable to the Newport Harborwalk.

However, another city, more similar to Newport, population-wise, which has developed shore-side trails, is Portland, Maine. For the past 30 years, the City of Portland has worked in conjunction with a nonprofit urban land trust, currently known as Portland Trails, in order to develop an extensive network of trails, both shore-side and inland, in the vicinity of that city.[35] Several of these trails border the shore. These trails were developed in various ways and are currently controlled by Portland Trails, which has apparently been given authority to maintain most if not all the trails by the city government and its Shoreway Access Plan.[36] The Back Cove Trail was "grandfathered" in, suggesting that Maine's PTD allowed the City to delegate it being held in trust for public use by Portland Trails, given a history of use by the public prior to the development of the Shoreway Access

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[33] *See id.* at 479; Boston harborwalk website, *supra.*, note 16.
[34] *See id.* at 523-30.
[35] *See* trails.org (last visited April 25, 2012).
[36] *See id.*

Plan.[37] The Eastern Prom Trail, another shore-side trail, was developed through a permit approved by the city council, and also by obtaining an easement from UNUM.[38] In doing so, Portland Trails helped Portland obtain federal funding to acquire a parcel of land for the trail, which it has done on other occasions for other sections of trail.[39]

There appears to be little legal history involving the development of the trails in Portland, suggesting that the project was for the most part supported by private landowners, voters, and private donors. Further, it was apparently able to get federal funding on several occasions for more than one project. One possible distinction that can be drawn between the situation in Newport and Portland's shore-side trails, based on this suggestion, is that much of the area that makes up Portland's trail system was either already public land, was purchased and became public land, or was donated by private individuals, as opposed to private land upon which public access is allowed.

C. Application of PTD and Rhode Island Property Laws to Newport Harborwalk

The application and interpretation of Rhode Island PTD and property law like the RUS, both by the government entities and by the courts, has positive and negative implications for the Newport Harborwalk. The best thing to take from is that with the RUS, private owners may be more willing to allow use of their properties because they will not be exposed to greater liability by doing so. Further, if the Cliff Walk is any indication, the organization in charge of any easement granted by a private property owner, be it a government organization or private entity, should have wide latitude to regulate and control that property. However, with this control also comes the potential for broader

[37] *See id.*
[38] *See id.*
[39] *See id.*

liabilities should something happen. This is the way the courts have moved, and thus the organization that is placed in charge of the Walk should be prepared for the exposure to damage awards for personal injuries.

It should be pointed out that the circumstances of the Cliff Walk are unique in that it developed over a long period of time, had a strong historical basis on which the City could use to assert control, and, as it was a strong tourism draw, the City had a strong financial interest in it as well. Without the historical basis or potential for increased tourism, the Newport Harborwalk project may have difficulty in drawing the kind of support it needs in the local or state governments. Any organization seeking to obtain strong legal rights and support in order to be able to assert control over any public easements that are granted by the private property owners, or implied by the courts because of the PTD, would need plenty of support from both the local and state governments, and having historical or financial justifications appear to be two ways to gain that support.

The most glaring problem with relying on the PTD is that its effectiveness is significantly dwindled once activity and development has taken place. As the Boston example shows, it has been great for controlling new developments and ensuring that new construction on the shoreline includes the development of the harborwalk. However, where property ownership was established, and development occurred prior to the fruition of the harborwalk idea, the city has, and will continue to have to rely on agreements (such as servitudes) with the private landowners. This latter situation is analogous to the situation in Portland, where an organization was able to acquire the land through various means, such as donations, federal grants, and working with the city government in its development and permitting of new projects.

Such is the case with the Newport Harborwalk moving forward. While the PTD may be used to develop and gain control of areas for the walkway in the context of new developments, it is much more difficult to effectuate results retroactively. The Newport Harborwalk is merely one public use that shoreline private property owners may avail themselves of in order to satisfy the regulations under the Rhode Island PTD. If they have already met a public use requirement, and developed the land, it would be difficult to convince a court that they should be required to subsequent to all that allow the right of access for Harborwalk. Not to mention the frustration such an action would cause the owner of desirable land for the future use of the Harborwalk.

Lastly, a word of caution in relying on the use of the PTD in Rhode Island moving forward as a means of improving the Newport Harborwalk for new development projects. As pointed out in the previous section, the Massachusetts administration and regulations under its version of the PTD is more consistent and perhaps more favorable to public rights than the Rhode Island version. In Rhode Island for instance, if one were looking to utilize PTD regulations, one would have to look at whether the private owner had title free and clear of public rights in land that had been filled in at the shoreline. Further, municipal zoning regulations for seaside developments in Newport may play more of an influential role in a decision by regulators to include such things as a walkway than in the new developments requiring walkways in Boston.

III. <u>Conclusion</u>

Moving forward, the development of the Newport Harborwalk should look to improve and obtain it shoreline access using Rhode Island's Public Trust Doctrine regulations, recognizing that while it may not be as assured a means of development as

other State’s versions, it does provide the opportunity for creating new areas of access for the walkway. Further, to maintain and preserve the areas on private property already serving as part of the Harborwalk, conservation easements, or the traditional form of easement in gross is likely the best servitude to accomplish this goal.